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Nos. 95-2008, 95-2013 and 95-2070

In the Supreme Court of the United States

OCTOBER TERM, 1995

Supreme Court, U.S.
FILED
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CLERK

WILLIAM J. MARKS, SR., PETITIONER

v.

UNITED STATES OF AMERICA

JIM GUY TUCKER, PETITIONER

v.

UNITED STATES OF AMERICA

JOHN HALEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, under the facts and circumstances of the investigation by the independent counsel, the Attorney General of the United States properly referred a particular "related matter" to the independent counsel for investigation and prosecution.

2. Whether, under the specific circumstances of this case, the court of appeals correctly concluded that the appearance of judicial bias or partiality warranted reassignment, pursuant to 28 U.S.C. § 2106, to a different district judge.

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OPINIONS BELOW

The opinion of the court of appeals (Tucker Pet. App. 1-28) is reported at 78 F.3d 1313. The order of the court of appeals denying petitions for rehearing and suggestions for rehearing *en banc*, along with the opinion of two dissenting judges (Tucker Pet. App. 29-46), is published at 82 F.3d 1423. The opinion of the district court (Tucker Pet. App. 47-68) is reported at 898 F. Supp. 654.

JURISDICTION

The judgment of the court of appeals was entered on March 15, 1996. Petitions for rehearing and suggestions for rehearing *en banc* were denied on May 6, 1996. The petitions for a writ of certiorari were filed on June 13, 14, and 26, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

Title 28, United States Code, Section 594(e) provides:

> An independent counsel may ask the Attorney General or the division of the court to refer to the independent counsel matters related to the independent counsel's prosecutorial jurisdiction, and the Attorney General or the division of the court, as the case may be, may refer such matters. If the Attorney General refers a matter to an independent counsel on the Attorney General's own initiative, the independent counsel may accept such referral if the matter relates to the independent counsel's prosecutorial jurisdiction. If the Attorney General refers any matter to the independent counsel pursuant to the independent counsel's request, or if the independent counsel

> accepts a referral made by the Attorney General on the Attorney General's own initiative, the independent counsel shall so notify the division of the court.

Title 28, United States Code, Section 2106 provides:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

Other relevant portions of the Ethics in Government Act, 28 U.S.C. §§ 591-599, are set forth at Tucker Pet. App. 87-101.

STATEMENT

1. On July 1, 1994—one day after enactment of the Independent Counsel Reauthorization Act of 1994—the Attorney General of the United States, acting pursuant to 28 U.S.C. § 592(c), applied to the United States Court of Appeals for the District of Columbia Circuit, Division for the Purpose of Appointing Independent Counsels ("Special Division") for the appointment of an independent counsel. (Marks Pet. App. 86-92). On August 5, 1994, the Special Division appointed the undersigned to that position. (Tucker Pet. App. 69-72).

The Attorney General's application recounted that in October 1993, the Resolution Trust Corporation (RTC) referred a number of allegations to the United States Attorney for the Eastern District of Arkansas concerning an Arkansas financial institu-

tion known as Madison Guaranty Savings & Loan and one of its principal owners, James B. McDougal. (Marks. Pet. App. 86). The application noted that McDougal had been a partner with President William Jefferson Clinton and First Lady Hillary Rodham Clinton in an Arkansas real estate venture known as Whitewater Development Corporation. (*Id.*). The Attorney General further explained that during that same time period, the United States Attorney was prosecuting David L. Hale, a Little Rock municipal judge, for fraud against the Small Business Administration. (*Id.* at 86-87). The fraud related to Capital Management Services, Inc., a federally-licensed small business investment company owned by Hale. (*Id.* at 87).

The Attorney General explained that while plea negotiations were underway between Hale and the United States Attorney in Little Rock, Hale made a number of allegations against former associates, including James McDougal, President Clinton, and Hillary Rodham Clinton, concerning the misuse of funds of Capital Management Services. (*Id.*). The Attorney General requested appointment of an independent counsel because investigation by the Department of Justice of the matters described in her application "would present a political conflict of interest." (*Id.* at 89).[1]

In accordance with 28 U.S.C. § 593(b)(3), the Special Division appointed the independent counsel

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[1] The Ethics in Government Act permits the Attorney General to seek appointment of an independent counsel to investigate and prosecute persons who are not officials of the Executive Branch if she determines that investigation or prosecution by the Justice Department "may result in a personal, financial, or political conflict of interest." 28 U.S.C. § 591(c)(1).

and defined his jurisdiction. The Special Division's order of August 5, 1994, provided:

> [The independent counsel] is hereby appointed . . . with full power, independent authority, and jurisdiction to investigate to the maximum extent authorized by the [Act] *whether any individuals or entities* have committed a violation of any federal criminal law . . . *relating in any way* to James B. McDougal's, President William Jefferson Clinton's, or Mrs. Hillary Rodham Clinton's relationships with Madison Guaranty Savings & Loan Association, Whitewater Development Corporation, or Capital Management Services, Inc. (Tucker Pet. App. 69) (emphasis added).

In addition, the order granted the independent counsel jurisdiction to investigate and prosecute "other allegations or evidence of violation of *any federal criminal law . . . by any person* or entity *developed during the Independent Counsel's investigation referred to above and connected with or arising out of that investigation.*" (emphasis added) (*Id.* at 70). The order also conferred "prosecutorial jurisdiction to fully investigate and prosecute the subject matter . . . as hereinbefore set forth, and *all matters and individuals whose acts may be related to that subject matter . . . .*" (*Id.* at 71) (emphasis added).

Shortly after the appointment, on August 31, 1994, the newly constituted Office of the Independent Counsel ("OIC") requested, pursuant to 28 U.S.C. § 594(e), that the Attorney General refer to the OIC a particular "related" matter—the investigation and possible prosecution of any violations of federal criminal law relating to a bankruptcy action entitled *In re: Landowners Management Systems, Inc., Tax*

Identification No. 75-2001914, Debtor, United States Bankruptcy Court, Northern District of Texas, Case No. 787-70392 (Chapter 11). By letter dated September 2, 1994, the Attorney General referred that matter. Acting Assistant Attorney General Keeney, speaking for the Attorney General, informed the OIC of the Attorney General's conclusion that the Landowners Management Systems bankruptcy matter is "related to your investigation." (Tucker Pet. App. 74). Based upon this specific prosecutorial judgment, Mr. Keeney stated that "[w]e therefore refer investigative and prosecutorial jurisdiction" to the OIC. (*Id.* at 75).[2]

2. The Attorney General referred the Landowners Management Systems bankruptcy matter to the OIC in the context of an ongoing criminal investigation that had begun in 1993. The Special Division's appointment of an independent counsel marked the third change in the prosecutorial authority vested with responsibility for investigating the matters then assigned to the OIC. As noted, the prosecution of David Hale was initiated by the United States Attorney's Office in Little Rock, and the RTC made criminal referrals to that same office in 1993. On November 5, 1993, however, after the publication of national news stories about Hale's allegations and the RTC's investigation of Madison Guaranty, the United States Attorney recused herself and her staff from

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[2] On September 12, 1994, in accordance with Section 594(e) of the Act, the OIC notified the Special Division of the Attorney General's referral. On December 16, 1994, in an abundance of caution, the independent counsel applied to the Special Division for an Order of Referral regarding the Landowners Management Systems bankruptcy action. On December 19, 1994, the Special Division also referred the matter to the OIC. (Tucker Pet. App. 76-79).

further investigation and prosecution of matters pertaining to Capital Management Services and Madison Guaranty.

As a result, a team of trial lawyers from the Fraud Section of the Criminal Division was assigned to undertake the prosecution of Hale and the investigation into matters concerning Capital Management Services, Madison Guaranty, and Whitewater Development. The Fraud Section continued its investigation through early 1994.

On January 20, 1994, after a request by President Clinton, the Attorney General announced the appointment of Robert B. Fiske, Jr., as an independent counsel pursuant to Justice Department regulations. *See* 28 C.F.R. § 600.1.[3] Mr. Fiske's regulatory jurisdiction included authority to investigate "whether any individuals or entities have committed a violation of any federal criminal or civil law relating in any way to President William Jefferson Clinton's or Mrs. Hillary Rodham Clinton's relationships with (1) Madison Guaranty Savings & Loan Association; (2) Whitewater Development Corporation; or (3) Capital Management Services." 28 C.F.R. § 603.1(a). The regulation went on to grant Mr. Fiske "jurisdiction and authority to investigate other allegations or evidence of violation of any federal criminal or civil law by any person or entity developed during the Independent Counsel's investigation referred to above, and connected with or arising out of that investigation." *Id.* § 603.1(b). Mr. Fiske thus assumed responsibility for all aspects of the ongoing investiga-

[3] At the time, the portions of the Ethics in Government Act that provided for a court-appointed independent counsel were not in effect. *See* 28 U.S.C. §§ 591-599.

tion, including the prosecution of David Hale and his codefendants.

On March 22, 1994, Hale pleaded guilty to a two-count information. Hale's plea agreement, requiring his cooperation with Mr. Fiske's office, was filed in open court. Thereafter, during interviews of David Hale, Mr. Fiske's office learned of allegations of fraudulent activity relating to petitioner Tucker and his cable company interests.

Mr. Fiske's office then investigated whether petitioner Tucker and others had committed any violation of federal law, including tax offenses, with respect to a claim Tucker asserted as a secured creditor in the Landowners Management Systems bankruptcy action. Tr. 29-30. As of the date of the Special Division's appointment of an independent counsel under the reauthorized statute, Mr. Fiske's office was actively investigating whether the use of a fraudulent bankruptcy proceeding to obtain tax benefits would justify a prosecution for federal tax violations.

In her July 1994 application for appointment of an independent counsel, the Attorney General requested that the Court grant the statutory independent counsel "the same prosecutorial jurisdiction as that granted to regulatory Independent Counsel Fiske, so that the investigation may continue without interruption." (Marks Pet. App. 90) (emphasis added). The Special Division granted the Attorney General's request and defined the independent counsel's jurisdiction in criminal matters at least as broadly as the jurisdiction granted to Mr. Fiske. (Tucker Pet. App. 69-72). Accordingly, the new independent counsel from the outset—without interruption—continued the investigation of matters under examination by Mr. Fiske's office, including the Landowners Management Systems bankruptcy.

3. The investigation by the newly constituted OIC, building upon the work of Mr. Fiske, led to the grand jury's indictment of June 7, 1995. All three petitioners were charged with one count of conspiring to defraud the United States by impeding the collection of revenue by the Internal Revenue Service. Petitioners Tucker and Marks each were charged with one count of making a false statement to a small business investment company (Capital Management Services) to obtain a $300,000 loan, and one count of conspiring to do so. (Tucker Pet. App. 13).

The case was assigned to United States District Judge Henry Woods.[4] Petitioners moved to dismiss the indictment on the ground that the OIC did not have jurisdiction to prosecute the offenses charged. Briefs were filed in July 1995, and Judge Woods scheduled a hearing for September 5, 1995. In the meantime, on August 17, 1995, the same grand jury returned a second indictment, which charged petitioner Tucker, James McDougal, and Susan McDougal with various offenses relating to Madison Guaranty and Capital Management Services. *United States v. McDougal*, No. LR-CR-95-173 (E.D. Ark. Aug. 17, 1995).[5]

On September 5, 1995, the district court held a hearing on the motions to dismiss the June 7 indictment. On the same day, the court ordered the indictment dismissed.

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[4] The case was assigned to Judge Woods after Judge Elsijane Roy recused herself. We note that other judges, in both the Eastern District of Arkansas and the Eighth Circuit, have seen fit to recuse themselves from all matters pertaining to the ongoing OIC investigation.

[5] A trial of these charges began in March 1996, and ended on May 28, 1996, with convictions of all three defendants.

The district court rejected the contention, pressed by both the OIC and the Attorney General as *amicus curiae*, that the Attorney General's decision to refer a related matter to an independent counsel is not subject to judicial review. (Tucker Pet. App. 56). The district court then reasoned that the matters charged in the June 7 indictment were "not related at all" to the OIC's jurisdictional mandate. (*Id.* at 57). Accordingly, the district court concluded that the Attorney General could not refer those matters to the OIC, and that the decision whether to prosecute the offenses alleged was vested only in the Attorney General or the United States Attorney for the Eastern District of Arkansas. (*Id.* at 67).

4. The court of appeals reversed. The court held that the Attorney General's decision to refer related matters to an independent counsel is not subject to judicial review. The court noted that prosecutorial decisions of the Attorney General long have been committed to the prosecutor's discretion. (Tucker Pet. App. 6-7). In addition, the court concluded that the definitive answer to the question of reviewability is found in the legislative history of the Ethics in Government Act. (*Id.* at 7). The report of a Conference Committee in 1987, the court explained, reflects explicitly the Committee's intent that "an Attorney General's determinations under the independent counsel law are not subject to judicial review." (Tucker Pet. App. 9).

Alternatively, the court of appeals held that even if the Attorney General's referral decision were subject to judicial review, the offenses charged in the June 7 indictment are related to the OIC's jurisdiction. The court reiterated that, as the statute is writ-

ten, "relatedness" is "an essentially standardless concept," because the term "related" is "undefined and without parameters." (*Id.* at 14). The court rejected as unduly narrow petitioners' argument that a "related matter" referred by the Attorney General to the OIC must be related to James McDougal's or President Clinton's or Mrs. Clinton's relationship to Capital Management Services or Madison Guaranty or the Whitewater Development Corporation. (*Id.* at 17). Instead, the court concluded that "relatedness for purposes of referral under § 594(e) depends upon the procedural and factual link between the OIC's original prosecutorial jurisdiction and the matter sought to be referred." (*Id.* at 18).

The court of appeals had "no difficulty" concluding that the June 7 indictment was sufficiently related to the OIC's mandate. (*Id.*). The court noted that there was an overlap in witnesses and defendants between the June 7 indictment of petitioners and the August 17 indictment of petitioner Tucker and the McDougals, which was at the heart of the OIC's original jurisdiction. The court further explained that there was a clearly defined relationship between Tucker and McDougal, Capital Management Services, and Madison Guaranty—all three of which were specifically named in the order defining the OIC's jurisdiction. Finally, the court observed that Capital Management Services was an entity named in the original jurisdictional order, and that material false statements to Capital Management Services by petitioners Tucker and Marks were alleged in the June 7 indictment. (*Id.*)

Having concluded that the case should be remanded for trial, the court of appeals turned to the government's request that the case be reassigned to a different judge on remand. The court held that the OIC

properly made the request to the court of appeals in the first instance, because the appellate court's authority to assign a case to a different judge on remand is premised on 28 U.S.C. § 2106, not on the recusal statutes alone. (Tucker Pet. App. 24-25). The court concluded that reassignment on remand was necessary to ensure the appearance of impartiality. (*Id.* at 29).

The court explained that information in the public domain, of which it could properly take judicial notice, demonstrated a close personal relationship between Judge Woods and President and Mrs. Clinton. (*Id.* at 21-22). The court also observed that petitioner Tucker had portrayed his prosecution as an attempt to embarrass President Clinton politically, and that President Clinton made a public speech solidifying his connection with Tucker at a lunch the day after Tucker's arraignment. (*Id.* at 22). In sum, the court concluded that given the high profile of the OIC's work and the reported connections among Judge Woods, the Clintons, and petitioner Tucker, reassignment was the proper course. (*Id.* at 26).

The full court of appeals denied petitioners' suggestions for rehearing en banc. (*Id.* at 29). Two judges voted to grant the suggestions and published a dissenting opinion. (*Id.* at 30-46). A third judge voted to rehear only the issue whether the case should be reassigned, but did not join the dissenting opinion.

ARGUMENT

The decision below is correct and does not conflict with any decision of this Court or any other court of appeals. Moreover, this litigation is at an interlocutory stage, and judicial efficiency would be better

served by deferring any review until rendition of final judgment. Further review is therefore not warranted.

1. a. The Ethics in Government Act requires the Special Division to define an independent counsel's jurisdiction adequately to investigate the "subject matter" of the Attorney General's application and "all matters related to that subject matter." 28 U.S.C. § 593(b)(3). The Act also provides a procedure for an independent counsel to confirm whether his jurisdiction, as conferred by the Special Division, extends to a particular matter. That procedure is set forth in Section 594(e) of the Act. If an independent counsel believes that a matter is *related to* (and therefore encompassed within) the jurisdiction defined by the Special Division, he may request the Attorney General or the Special Division to refer that matter to the independent counsel. Upon determining that the matter is related, the Attorney General or the Special Division, as the case may be, may thereupon refer the matter. 28 U.S.C. § 594(e). The OIC scrupulously followed that statutorily-ordained procedure in this case. (Tucker Pet. App. 74-75).

Petitioners continue to assert that the court of appeals' principal holding—that the Attorney General's decision to refer a related matter to an independent counsel is not subject to judicial review—conflicts with this Court's decision in *Morrison v. Olson*, 487 U.S. 654 (1988). They are wrong. *Morrison* did not address—directly or otherwise—the issue presented in this case.

At bottom, petitioners profoundly misunderstand *Morrison*. The principal questions presented there were whether the delegation of Executive and ap-

pointment powers *to a court* (the Special Division) contravened the Appointments Clause, Article III, or the principle of separation of powers. In upholding the statute, this Court took pains to emphasize the limited role of the Judiciary (through the Special Division) and the centrality of the Attorney General's role under the Ethics in Government Act. *Morrison*, 487 U.S. at 696.

In urging a conflict between the court of appeals' decision and *Morrison*, petitioners invoke *Morrison*'s holding that an independent counsel's jurisdiction as initially defined by the Special Division must be "demonstrably related to the factual circumstances that gave rise to the Attorney General's investigation and request for the appointment of an independent counsel . . . ." 487 U.S. at 679. (Tucker Pet. 10-11; Marks Pet. 21; Haley Pet. 11). This badly misses the mark. The "demonstrable relationship" requirement is a limitation on the authority of the Special Division to define an independent counsel's original jurisdiction. That requirement stems from constitutional problems spawned by vesting additional Executive power in an Article III court. Nothing in *Morrison* even remotely suggests that judicial review of the Attorney General's actions under the Act is necessary to ensure the constitutionality of the statute. To so transmogrify *Morrison*'s concern as to judicial intrusion (at Congress' instance) into the province of the Executive bespeaks a wildly ill-conceived theory of separation of powers. Indeed, the Special Division itself explained recently that its own authority under Section 594(e), which was discussed in *Morrison*, 487 U.S. at 680 n.18, "contrasts with the Attorney General's broader referral power, *which is*

not constrained by separation-of-powers concerns." *In re Espy*, 80 F.3d 501, 507 (D.C. Cir. Sp. Div. 1996) (emphasis added).

Petitioners' repeated invocation of the Constitution and *Morrison* cannot mask this decisive point: Executive power in this case (the assignment of jurisdiction to a federal prosecutor) was exercised by a principal officer of the Executive Branch (the Attorney General of the United States), not by a court. That pivotal fact ends any separation-of-powers concern and defeats any contention that the decision below conflicts with *Morrison*.

b. Petitioners also err in invoking *Heckler v. Chaney*, 470 U.S. 821 (1985). (Marks Pet. 12; Haley Pet. 8). Petitioners argue that the decision is inconsistent with discussion in *Chaney* concerning the presumption of judicial review of enforcement action by an agency.

The presumption of judicial review is inverted here, where the administrative action involved is the Attorney General's exercise of prosecutorial discretion. To return to first principles: there is a long tradition of deference to prosecutorial judgments of the Executive Branch, and the presumption in that context is against judicial review. This Court and the courts of appeals have held time and again that —unlike typical review of administrative agency actions—fundamental prosecutorial decisions are subject to limited or no judicial review. *E.g.*, *Wayte v. United States*, 470 U.S. 598, 607-08 (1985) (absent evidence of unconstitutional motive, decisions whether or not to prosecute, and what charges to bring before a grand jury, are within realm of prosecutorial discretion); *Ullman v. United States*,

350 U.S. 422, 431-34 (1956) (determination by United States Attorney that public interest requires immunity is not reviewable).[6]

c. In any event, the court of appeals indulgently allowed for the presumption of reviewability urged by petitioners. In response to petitioners' argument, the court recognized this Court's statement that "judicial review of executive action 'will not be cut off *unless there is persuasive reason to believe that such was the purpose of Congress.*'" (Tucker Pet. App. 12 (quoting *Gutierrez de Martinez v. Lamagno*, 115 S. Ct. 2227, 2231 (1995) (emphasis in court of appeals' opinion) (internal citations omitted)). After carefully examining the text, structure, and history of the Ethics in Government Act, however, the court expressly found that the evidence of congressional

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[6] *See also United States v. Gonzalez*, 58 F.3d 459, 462 (9th Cir. 1995) ("Separation-of-powers concerns generally require a district court to defer to the government's decision to seek a dismissal of a criminal charge because a denial of the motion would represent an intrusion upon prosecutorial prerogative"); *United States v. Robertson*, 45 F.3d 1423, 1438 (10th Cir.) ("while district courts may reject charge bargains in the sound exercise of judicial discretion, concerns relating to the doctrine of separation of powers counsel hesitancy before second-guessing prosecutorial choices"), *cert. denied*, 115 S. Ct. 2258, 2259 *and* 116 S. Ct. 133 (1995); *United States v. Hooks*, 848 F.2d 785, 802 (7th Cir. 1988) (where prosecutor declines to immunize defense witness, defendant must "make a substantial evidentiary showing that the government intended to distort the judicial fact-finding process before we will depart from the strong tradition of deference to prosecutorial discretion"); *United States v. Ammidown*, 497 F.2d 615, 621 (D.C. Cir. 1973) (courts are presumed to follow United States Attorney's determination to accept plea agreement because "[h]e alone is in a position to evaluate the government's prosecution resources").

purpose to preclude judicial review of the Attorney General's determination is "more than just persuasive, it is beyond reasonable dispute." (Tucker Pet. App. 12) (internal quotations omitted).

d. As if more were needed, the holding below concerning reviewability does not merit further review for another reason: the court held alternatively that even if the Attorney General's referral were subject to judicial review, then the Landowners Management Systems bankruptcy matter was "related" to the OIC's jurisdiction. Thus, even were petitioners to prevail on their reviewability claim, they would gain no relief, unless the Court were to revisit the fact-bound holding of the court of appeals concerning relatedness and reverse on that score as well.

2. Petitioners argue that the court of appeals also erred by holding, under the facts and circumstances of the independent counsel's investigation, that the Landowners Management Systems bankruptcy matter was related to the subject matter of the OIC's jurisdiction. That alternative holding is quintessentially factbound. The court of appeals' decision pursuasively explains the relationship between the OIC's original jurisdiction, as represented by the August 17 Tucker-McDougal indictment, and the June 7 indictment of petitioners. (Tucker Pet. App. 18). Moreover, the court had before it the fact that petitioner Tucker's ability to borrow $300,000 from Capital Management Services, as charged in the June 7 indictment, was a direct consequence of the fraudulent scheme involving McDougal, Madison Guaranty, and Capital Management Services that was charged in the August 17 indictment. The court's factually-laden conclusion concerning "relatedness" is correct and does not warrant further review.

a. Contrary to petitioner Marks' contention, the decision does not adopt a standard of "administrative convenience" to determine "relatedness" for purposes of 28 U.S.C. § 594(e). The phrase "administrative convenience"—repeated throughout Marks' petition in quotation marks as though it were actually part of the decision—appears nowhere in the opinion of the court of appeals. Rather, the court held that "relatedness for purposes of referral under § 594(e) depends upon the procedural and factual link between the OIC's original prosecutorial jurisdiction and the matter sought to be referred." (Tucker Pet. App. 18). That interpretation of "relatedness" has been endorsed subsequently by the Special Division, *In re Espy*, 80 F.3d at 507-08, and there is no decision to the contrary.

b. The court of appeals' interpretation of the statutory term "related" affords due deference to the Attorney General's construction of a statute that she is charged with administering. The Justice Department, as *amicus curiae* in the courts below, enumerated the factors that may inform an Attorney General's referral decision under Section 594(e):

- whether the same subject or target of an investigation is involved;
- whether there has been similar conduct by some of the parties already being investigated;
- whether there is a significant overlap in potential witnesses, and a resulting potential for interference with an independent counsel's investigation;
- whether the additional matters arise out of the same underlying facts as the original jurisdiction;

- whether the same legal issues are likely to be involved;
- the nature of the new allegations against a person who may be a key witness in an independent counsel's investigation; and
- which prosecutorial body can most efficiently investigate and prosecute the matter.

Brief *Amicus Curiae* of the Department of Justice, filed in No. 95-3268EALR, at 14.

These factors are important to the effective conduct of complex white collar criminal investigations. Petitioners' vision of Section 594(e)—a simple comparison between the face of an indictment and an independent counsel's jurisdictional mandate—conveniently ignores the reality of complex financial-crimes investigations. As the Justice Department explained as *amicus* below, an independent counsel's investigation may uncover evidence of criminal activity committed by a potential witness in a matter at the center of the independent counsel's jurisdiction. Under those circumstances, the Attorney General should enjoy discretion to refer that witness's prosecution to the independent counsel so that, for example, the independent counsel can seek the witness's cooperation in the balance of his investigation.

Or, as here, an independent counsel conducting a detailed review of activities of financial institutions may uncover criminal offenses that do not involve Executive Branch officials covered by the provisions of the Ethics in Government Act. The Justice Department urged, rightly, that "it is contrary to every consideration of judicial and prosecutorial efficiency to deprive the Attorney General of discretion to refer that criminal activity to the independent counsel."

Brief of the Department of Justice at 17. There is no evidence that Congress intended to reject the Justice Department's sensible construction of "related." Further review of the Attorney General's factbound relatedness determination is not warranted.

c. Finally, the interlocutory stage of this litigation counsels against review of the court of appeals' holding that the OIC enjoys jurisdiction to prosecute this case. Even if this Court were to conclude that the decision presents any substantial constitutional or statutory issue, the better course is to wait for this litigation to proceed to final disposition below. If petitioners are convicted, then the Court will be in a position efficiently to consider all claims in a single petition and determine whether review is warranted.

3. Petitioners Tucker and Marks also urge this Court to consider whether the court of appeals correctly determined, on the facts and circumstances of this litigation, that the case should be remanded to a different district judge for trial. The decision below correctly applied settled legal principles to the circumstances of this case. Further review is not warranted.

Petitioners urge that the decision conflicts with the conclusion of other courts of appeals that there is a timeliness requirement for recusal motions filed under 28 U.S.C. § 455(a). Petitioners contend that because the OIC did not move in the district court to recuse Judge Woods, the court of appeals should not have been free to reassign the case on remand.

The authorities cited by petitioners, however, are inapposite to the relief sought by the OIC and granted by the court of appeals. Petitioners cite several cases in which courts of appeals have implied

a timeliness requirement for recusal motions pursuant to 28 U.S.C. § 455(a).[7] The decisions cited by petitioners involve attempts by a party to obtain reversal of a district court's judgment based on the failure of the district judge to recuse. These courts have concluded that a party appealing an adverse ruling should not be able to obtain relief from a judgment based on a disqualification claim that was known, but not raised, in the district court.

In this case, by contrast, the court of appeals did not act pursuant to the recusal statute, 28 U.S.C. § 455(a). The OIC did not urge that the district court's order dismissing the indictment should be reversed because Judge Woods should have recused. The court of appeals reversed solely on the ground that the judgment was wrong as a matter of law. The court addressed the government's request for reassignment only after concluding that the indictment should be reinstated. (Tucker Pet. App. 21, 24-25).

The reassignment of this case to a different judge was based on the court of appeals' statutory authority—independent of the recusal statutes—to require

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[7] *United States v. Brinkworth*, 68 F.3d 633, 639 (2d Cir. 1995); *Travelers Ins. Co. v. Liljeberg Enters., Inc.*, 38 F.3d 1404, 1410 (5th Cir. 1994); *The El Fenix v. M/Y Johanny*, 36 F.3d 136, 141 (1st Cir. 1994); *In re Anwiler*, 958 F.2d 925 (9th Cir.), *cert. denied*, 506 U.S. 882 (1992); *Polaroid Corp. v. Eastman Kodak Co.*, 867 F.2d 1415, 1420-21 (Fed. Cir.), *cert. denied*, 490 U.S. 1947 (1989); *Parker v. Conners Steel Co.*, 855 F.2d 1510, 1526 (11th Cir. 1988), *cert. denied*, 490 U.S. 1066 (1989); *Willner v. University of Kansas*, 848 F.2d 1023, 1028 (10th Cir. 1988), *cert. denied*, 488 U.S. 1031 (1989); *Phillips v. Amoco Oil*, 799 F.2d 1464, 1472 (11th Cir. 1986), *cert. denied*, 481 U.S. 1016 (1987).

"such further proceedings to be had as may be just under the circumstances." 28 U.S.C. § 2106. (Tucker Pet. App. 23). The decision is consistent with this Court's explanation of the reassignment power, *see Liteky v. United States*, 114 S. Ct. 1147, 1156-57 (1994), and the decisions of several courts of appeals that recognize an appellate court's independent authority to reassign a case on remand. *United States v. Microsoft Corp.*, 56 F.3d 1448, 1463 (D.C. Cir. 1995) (per curiam); *United States v. Bertoli*, 40 F.3d 1384, 1411 (3d Cir. 1994), *cert. denied*, 116 S. Ct. 1425 (1996); *O'Rourke v. City of Norman*, 875 F.2d 1465, 1475 (10th Cir.), *cert. denied*, 493 U.S. 918 (1989); *United States v. Torkington*, 874 F.2d 1441, 1446 (11th Cir. 1989) (per curiam); *United States v. Sears, Roebuck & Co.*, 785 F.2d 777, 780 (9th Cir.), *cert. denied*, 479 U.S. 988 (1986); *Dyas v. Lockhart*, 705 F.2d 993, 997-98 (8th Cir.), *cert. denied*, 464 U.S. 982 (1983); *United States v. Garcia*, 694 F.2d 294, 296 (1st Cir. 1982) (per curiam); *United States v. Robin*, 553 F.2d 8, 10 (2d Cir. 1977) (en banc) (per curiam).

The Ninth Circuit, in the course of reassigning a case to a different district judge, explained the flaw in petitioners' timeliness argument:

> We are not acting under the disqualification statutes, which a party must first invoke before the district court. Instead, this court is being asked in the first instance to exercise its inherent power to administer the system of appeals and remands by ordering a case reassigned on remand. The basis for the reassignment is not actual bias on the part of the judge, but rather a belief that the healthy administration of the judicial and appellate processes, as well as the appearance of justice, will best be served by

> such reassignment. We do not believe that the statutory provisions concerning disqualification are either exhaustive or the exclusive method whereby a judge may be removed from hearing a case. . . . [T]he appellate court's authority to reassign exists apart from the judicial disqualification statutes. There is simply nothing in the disqualification statutes to prohibit this court from taking appropriate action in the first instance.

United States v. Sears, Roebuck & Co., 785 F.2d at 780-81. Since the decision in this case, the Eighth Circuit itself has distinguished between an appellate court's reassignment power pursuant to 28 U.S.C. § 2106, which does not require a prior recusal motion in the district court, and the recusal statute, 28 U.S.C. § 455(a), which has an implied timeliness requirement. *In re Kansas Public Employees Retirement Sys.*, 85 F.3d 1353, 1360 (8th Cir. 1996).

Petitioners also complain that the court of appeals should not have taken judicial notice of news reports and other information in the public domain that demonstrated an appearance of judicial bias or partiality. (Marks Pet. 27). The courts of appeals, however, have considered news articles that shed light on the appearance of bias by a trial judge, including articles that recount interviews with the judge himself. *In re IBM Corp.*, 45 F.3d 641, 642-43 (2d Cir. 1995); *Haines v. Liggett Group, Inc.*, 975 F.2d 81, 97 (3d Cir. 1992); *In re Continental Airlines Corp.*, 901 F.2d 1259, 1261 & n.1, 1263 n.3 (5th Cir. 1990), *cert. denied*, 113 S. Ct. 87 (1992). Petitioners cite no case that conflicts with the proposition that a

court of appeals has discretion to take judicial notice of reliable information in the public domain.[8]

Moreover, this case is a poor vehicle for the Court to consider the nuances of the doctrine of judicial notice. Petitioners have not disputed any of the facts relied upon by the court of appeals in its reassignment order. They thus present only an abstract theoretical challenge to a procedural decision of the court of appeals. The court of appeals correctly concluded that the circumstances of this case warranted reassignment. (Tucker Pet. App. 23).

This case has been delayed over one year by the erroneous dismissal of the indictment. Further review of petitioners' factbound claims for the sole purpose of determining which judge will preside at trial is not warranted.

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[8] The cases cited by the two judges dissenting from the denial of rehearing are not to the contrary. (Tucker Pet. App. 39). In three of those cases, the court found that information reported in newspaper articles was demonstrably inaccurate or explained by other information. *United States v. Darden*, 70 F.3d 1507, 1536 (8th Cir. 1995), *cert. denied*, 116 S. Ct. 1449 *and* 64 U.S.L.W. 3855 (1996); *Miller v. Tony and Susan Alamo Foundation*, 924 F.2d 143, 147 (8th Cir. 1991); *Easley v. University of Michigan Bd. of Regents*, 853 F.2d 1351, 1356 n.4 (6th Cir. 1988). In contrast, the court of appeals in this case noted that "[n]owhere do the appellees give us reasons for concluding that the matters the Independent Counsel has brought to our attention do not create an appearance of bias." (Tucker Pet. App. 23). In the fourth case cited by the dissent from denial of rehearing, the Tenth Circuit found that a television interview granted by the district judge required his removal. *United States v. Cooley*, 1 F.3d 985, 994 (10th Cir. 1993).

CONCLUSION

The petitions for a writ of certorari should be denied.

Respectfully submitted.

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